No. 01-1096

Supreme Court, U.S.
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In The

Supreme Court of the United States

KENT W. URBINE,

Petitioner,

v.

PIEDMONT TRIAD AIRPORT AUTHORITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
NORTH CAROLINA

BRIEF IN OPPOSITION

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POLICE DEPARTMENT
SUPREME COURT U.S.
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STATEMENT OF THE CASE

The Petition describes a case different from the one decided by the trial court and the North Carolina Supreme Court. This is a routine condemnation case, in which respondent Piedmont Triad Airport Authority ("PTAA") seeks to acquire 2.326 acres of land owned by Petitioner ("the Property"). The Property is surrounded by land already owned by PTAA. Both the trial court and the North Carolina Supreme Court held that PTAA is authorized to condemn the Property. Both the trial court and the North Carolina Supreme Court rejected Petitioner's federal Constitutional challenges, including Petitioner's Commerce Clause challenge to the condemnation.

The question now presented by Petitioner is not the question that was, or could have been, decided by the North Carolina courts. As those courts properly concluded, this is a condemnation case, and nothing more. Those courts concluded that the Commerce Clause issue raised by Petitioner based upon an alleged "package" of incentives offered to Federal Express Corporation ("Federal Express") by the State of North Carolina and local government entities was not properly before them because the incentives were immaterial to PTAA's right to condemn the Property and because neither the State nor the local government entities were parties to the case.

The trial court found as a fact:

> Defendant Kent W. Urbine has offered evidence attempting to show that governmental entities not parties to this lawsuit have proposed various economic "incentives" to Federal Express provided it locates its Mid-Atlantic Hub at the Airport.

Pet. App. 24a. Upon this finding, the trial court concluded as a matter of law:

> The alleged economic incentives proposed to Federal Express by governmental entities not parties to this lawsuit are immaterial to and provide no defense to the Airport Authority's right to condemn the property at issue.

Pet. App. 26a.

The North Carolina Supreme Court also concluded that a Commerce Clause challenge to the alleged incentive "package" was not properly before it, stating:

> Defendant next challenges this condemnation proceeding by alleging that PTAA offered Federal Express numerous unconstitutional incentives to build its air cargo hub at the airport. Defendant classifies the condemnation as one of the incentives. Specifically, defendant contends that the proposed incentives violate Article I, Section 8, Clause 3 (the Commerce Clause) of the United States Constitution; ...

> The only portion of this issue properly before this Court is the condemnation of defendant's property. Defendant's challenge to the "package" of economic incentives, apart from the use of eminent domain, pertains to offers by entities not parties to this action and is outside the scope of our review. Thus, the only remaining question presented in this issue is whether the Commerce Clause is a sustainable defense to the condemnation proceeding. . . . We find no case law that supports the proposition that the Commerce Clause is a sustainable defense to the condemnation of real property. This assignment of error is overruled.

Pet. App. 12a-13a.

This case, then, is not about economic incentives. That issue was not properly raised in the state courts below and is not properly before this Court. This case is and always has been a routine condemnation action, which the state courts concluded has been properly conducted by PTAA in accordance with all applicable state law and which is not precluded by the Commerce Clause.

PTAA condemned the Property, which is surrounded by other property owned by PTAA, because, as the trial court found:

> 20. Whether or not Federal Express ultimately locates its Mid-Atlantic Hub at the Airport, the property at issue and the surrounding properties already owned by the Airport Authority are needed for the expansion and enlargement of the facilities of the Airport, including but not limited to the cargo storage and handling facilities, and to permit better utilization of the Airport Authority's existing properties for aviation purposes. . . .
>
> 21. Acquisition of the property at issue will fill in the Airport Authority's land holdings in the northwest quadrant of the Airport. The property at issue in this action and the property at issue in Guilford County Superior Court Case No. 98 CvS 11587 are the only two properties on Old Oak Ridge Road between Inman Road and Bryan Boulevard which are not owned by the Airport. . . .

Pet. App. 23a.

Since the Property was properly condemned for a public purpose, i.e. airport development, "whether or not Federal Express ultimately locates its Mid-Atlantic Hub at the Airport", Pet. App. 23a, the trial court concluded that the incentives issue, which related only to Federal Express, was immaterial.

Likewise, the North Carolina Supreme Court concluded:

> We are aware that the timing of the events surrounding this condemnation proceeding point to an inference that the property is being acquired to prepare for the accommodation of an expanded Federal Express facility. Our review of the facts leads us to the conclusion, consistent with that of the trial court, that the condemnation proceeding arises from PTAA's long-range plan to develop air-cargo facilities as called for in the [Airport Authority's] master plan. While the overtures from Federal Express may have hastened the timing of this development, they are not the genesis of PTAA's actions.

Pet. App. 11a.

The incentives issue was not properly before the state courts procedurally, and it was immaterial to the validity of the condemnation, as both courts below recognized. The same would be true in this Court.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT PROPERLY PRESENT THE QUESTION UPON WHICH PETITIONER SEEKS REVIEW.

Whether the incentives complained of by Petitioner violate the Commerce Clause was not decided by the state courts below because Petitioner was procedurally barred from raising this issue. The parties necessary for a determination of the issue, i.e. the parties offering the incentives and the parties allegedly discriminated against by the incentives, are not parties to the case. The same procedural defect persists in this Court, presenting an insurmountable obstacle to the Court's consideration of the issue.

The courts below also determined that the incentives were immaterial to the condemnation. Whatever incentives were offered to Federal Express, they have no logical bearing on the sole issue in the case, which is whether PTAA has the right to condemn the Property. The tax incentives described in the Petition were offered by the North Carolina General Assembly, not PTAA. Furthermore, the trial court found, and the North Carolina Supreme Court agreed, that Federal Express was not the genesis for the condemnation. PTAA has need for and has properly condemned the Property, whether or not Federal Express locates its Mid-Atlantic Hub facility at the Airport. Therefore, even if the incentives offered to Federal Express somehow violate the Commerce Clause, this violation cannot affect the condemnation itself. The immateriality of the Commerce Clause-incentives issue to the condemnation at issue precludes this Court's consideration of the issue in this setting.

II. PETITIONER LACKS STANDING TO RAISE A COMMERCE CLAUSE CHALLENGE.

By raising a Commerce Clause issue, Petitioner is trying to assert the rights of others. Petitioner lacks standing to pursue this challenge. A party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (1975). Petitioner contends that the alleged incentives offered to Federal Express by the State of North Carolina and local government units discriminate against interstate commerce, apparently on the theory that a company that chooses to build a facility outside of North Carolina cannot benefit from the incentives and is being discriminated against. Even if this argument could be considered in this case, the party with standing would be the out-of-state company, not Petitioner. See Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County, 115 F.3d 1372, 1381 (8th Cir. 1997), cert. denied, 522 U.S. 1036 (1997).

III. EVEN IF THE TAKING IS SUBJECT TO COMMERCE CLAUSE ANALYSIS, PETITIONER HAS NOT SHOWN ANY VIOLATION OF THE COMMERCE CLAUSE.

"The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State." West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 (1994). The condemnation

here involves no such tariff or comparable burden on any out-of-state interest. Therefore, it does not implicate the Commerce Clause.

Petitioner relies primarily upon Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977), and West Lynn Creamery, Inc. v Healy, 512 U.S. 186 (1994). These cases are completely inapposite. In both cases, the State imposed a tax burden on out-of-state business that was not imposed on local business, resulting in unconstitutional discrimination.

In Boston Stock Exchange, the New York legislature amended a tax statute addressing the sales of securities "so that transactions involving an out-of-state sale [would be] taxed more heavily than most transactions involving a sale within the state." Id. at 319. As a result of the statutory amendment, "a nonresident contemplating the sale of securities that would be delivered or transferred in New York" faced a significantly higher tax burden if the sale was made outside New York. Id. at 331. The Court held that "[b]ecause it imposes greater tax liability on out-of-state sales that on in-state sales," the tax violated the Commerce Clause. Id. at 332. The Court concluded its opinion: "We hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State." Id. at 337.

Likewise in West Lynn Creamery, Massachusetts imposed a discriminatory burden on out-of-state milk producers as compared with in-state producers. West Lynn Creamery, 512 U.S. at 190-91. All milk sold in Massachusetts was taxed by the state, but the funds collected were then distributed to in-state milk producers. Id. The combination of the tax and

subsidy had the effect of a tariff upon out-of-state producers that violated the Commerce Clause. Id. at 199.

Neither PTAA nor any other governmental entity has imposed any tax or other burden on an out-of-state entity. PTAA does not even have the power to tax. Pet. App. at 16a.

Moreover, Petitioner has failed to show how any of the property taxes or sales taxes referred to in the Petition would apply to operations that are performed from out-of-state facilities by competitors of Federal Express, much less how a discriminatory burden has been imposed on such operations. These property taxes and sales taxes on in-state property and in-state purchases do not violate the Commerce Clause.[1]

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[1] Petitioner's Commerce Clause challenge fails for two other reasons. First, PTAA's lease proposal to Federal Express is within its proprietary powers; PTAA is, therefore, protected by the "market participant exception" to the application of the Commerce Clause. See Four T's, Inc. v. Little Rock Municipal Airport Commission, 108 F.3d 909, 912-13 (8th Cir. 1997); Air Transport Association of America v. City and County of San Francisco, 992 F. Supp. 1149, 1163 (N.D.Cal. 1998), affirmed, 266 F.3d 1064 (9th Cir. 2001). Second, when Congress specifically authorizes the actions of a local government entity, those actions cannot violate the Commerce Clause. See Western & Southern Life Ins. Co. v. State Board of Equalization, 451 U.S. 648, 652-53 (1981); 49 U.S.C. §41713 (authorizing airports to carry out their "proprietary powers and rights"); 49 U.S.C. §47101(a)(4) & (7)(supporting the nationwide development of "cargo hub airports" and projects to accommodate passenger and cargo traffic).

IV. THIS CASE MEETS NONE OF THE STANDARDS FOR GRANTING A PETITION FOR WRIT OF CERTIORARI SET FORTH IN THE RULES OF THIS COURT.

Rule 10 of the United States Supreme Court sets forth the considerations governing review on certiorari. Pursuant to Rule 10, a petition for writ of certiorari will be granted "only for compelling reasons." There are no compelling reasons to review this case.

Furthermore, none of the specific grounds set forth in Rule 10 are satisfied by the Petition. The North Carolina Supreme Court has not decided an important question of federal law. The North Carolina Supreme Court determined that the condemnation at issue was for a public use consistent with the North Carolina General Statutes, North Carolina case law and the North Carolina Constitution.

With respect to Petitioner's Commerce Clause challenge, the North Carolina Supreme Court stated that the only issue properly before it was the condemnation of defendant's property; it concluded that there is no case law supporting the proposition that the Commerce Clause is a sustainable defense to the condemnation of real property. Since condemnation of real property has occurred in the United States for centuries, the North Carolina Supreme Court's decision that the Commerce Clause does not apply to the taking of real property does not involve an important question of federal law.

The North Carolina Supreme Court's decision regarding the inapplicability of the Commerce Clause to the condemnation also does not conflict with a decision of another state court of last resort, a United States court of appeals or this Court. There are no

conflicting decisions, as shown by Petitioner's failure to cite any case in which the Commerce Clause has been applied to prevent the condemnation of real property.

Finally, there is no reason why the Commerce Clause's applicability to the condemnation of real property should be "settled" by this Court. The Federal Constitutional basis for challenging a condemnation of real property is the Fifth Amendment of the United States Constitution, not the Commerce Clause.

CONCLUSION

The Petition is based upon an alleged violation of the Commerce Clause. The Commerce Clause has never been applied to prevent a condemnation of real property. The cases of this Court interpreting the Commerce Clause have focused upon alleged discrimination in taxation by a state in favor of an in-state competitor to the harm of an out-of-state competitor. Here, neither the parties alleged to have established the allegedly discriminatory taxing scheme (the State of North Carolina and local government units) nor the parties alleged to have been discriminated against (the competitors of Federal Express) are parties in this case. The case has been decided correctly by the trial court and the North Carolina Supreme Court based on the real issue in the case, namely whether PTAA has the authority to condemn the Property. If there is any issue to be raised concerning the constitutionality of alleged incentives to be provided by the State of North Carolina and local government units to Federal Express, that issue is for another case, litigated by the real parties in interest.

Respectfully submitted, this 26th day of February, 2002.

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